

2012 WL 6620554 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Florida,  
Fifteenth Judicial Circuit.  
Palm Beach County

Rosa Williams ZEIGLER, as Personal Representative of the estate of James E. Zeigler, Deceased, Plaintiff,  
v.

FL - PALM BEACHES, LLC, d/b/a The Rehabilitation Center of The Palm Beaches, a Florida  
Limited Liability Company, John Doe, Individually, and Jane Doe, individually, Defendants.

No. 50-2012-CA-006418XXXXMB.  
May 4, 2012.

**Defendant's Motion To Dismiss Plaintiffs Complaint**

[Karen M. Rich](#)/Fbn: 012645, [George M. Vinci](#)/Fbn: 817201, Spector Gadon & Rosen, LLP, 360 Central Avenue, #1550, St. Petersburg, FL 33701, 727-896-4600; Fax: 727-896-4604, Attorneys for Defendants.

COME NOW the Defendants, FL - PALM BEACHES, LLC, d/b/a THE REHABILITATION CENTER OF THE PALM BEACHES, a Florida Limited Liability Company, JOHN DOE, Individually, and JANE DOE, individually, by and through the undersigned counsel, and files this Motion to Dismiss Plaintiffs Complaint and as grounds hereof states as follows:

1. Plaintiff filed a Complaint in the instant litigation. *See* Exhibit A.
2. Plaintiffs Complaint sounds in the following causes of action:
  - a) Count I: Non-Lethal Negligence Damages Against FI-Palm Beaches, LLC d/b/a The Rehabilitation Center of the Palm Beaches, John Doe and Jane Doe.
  - b) Count II: Lethal Negligence Damages Against FI-Palm Beaches, LLC d/b/a The Rehabilitation Center of the Palm Beaches, John Doe and Jane Doe.
  - c) Count III: Lethal Wrongful Death Damages Against FI-Palm Beaches, LLC d/b/a The Rehabilitation Center of the. Palm Beaches, John Doe and Jane Doe.
  - d) Count IV: Breach of Fiduciary Duty Against FI - Palm Beaches, LLC.
  - e). Count V: Violations of [Florida Statutes §415.1111](#) as to FL- Palm Beaches, LLC d/b/a The Rehabilitation Center of the Palm Beaches.
  - f) Count V: Violations of [Florida Statutes §415.1111](#) as to John Doe, Individually and Jane Doe, Individually.
3. The gravamen of Plaintiffs Complaint pertains to alleged violations of James Zeigler's statutory rights as a nursing home resident The Rehabilitation Center of the Palm Beaches.

***COUNTS I, II AND III SHOULD BE DISMISSED FOR FAILING TO ELECT A REMEDY***

5. Count I of the Complaint states a cause of action for Non-Lethal Negligence Damages Against FI-Palm Beaches, LLC d/b/a The Rehabilitation Center of the Palm Beaches, John Doe and Jane Doe.
6. Count II of the Complaint states a cause of action for Lethal Negligence Damages Against FI-Palm Beaches, LLC d/b/a The Rehabilitation Center of the Palm Beaches, John Doe and Jane Doe.
7. Count III of the Complaint states a cause of action for Lethal Wrongful Death Damages Against FI-Palm Beaches, LLC d/b/a The Rehabilitation Center of the Palm Beaches, John Doe and Jane Doe.
8. Florida Statutes, Chapter 400.023 provides, in pertinent part, as follows: If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall be required to elect either survival damages pursuant to s. 46.021 or wrongful death damages pursuant to s. 768.21. If the action alleges a claim for the resident's rights or for negligence that did not cause the death of the resident, the personal representative of the estate may recover damages for the negligence that caused injury to the resident.
9. As such, Plaintiff's Complaint should be dismissed for failing to elect a remedy as required by Florida Statute, Chapter 400.023.

***COUNTS I, II AND III SHOULD BE DISMISSED FOR IMPROPERLY  
STATING A CAUSE OF ACTION FOR NEGLIGENT HIRING***

10. Plaintiff pleads, in Count I of the Complaint, which was brought pursuant to Florida Statutes, Chapter 400, that Defendants owed a duty to James Zeigler to properly hire, retain and supervise nurses on Defendants staff. See Complaint, Paragraph 34.
11. Plaintiff pleads, in Count II of the Complaint, which was brought pursuant to Florida Statutes, Chapter 400, that Defendants owed a duty to James Zeigler to properly hire, retain and supervise nurses on Defendants staff. See Complaint, Paragraph 41.
12. Plaintiff pleads, in Count III of the Complaint, which was brought pursuant to Florida Statutes, Chapter 400, that Defendants owed a duty to James Zeigler to properly hire, retain and supervise nurses on Defendants staff. See Complaint, Paragraph 48.
13. There is no such duty to retain, hire, and supervise nursing staff set forth in Florida Statutes, Chapter 400.022 that clearly enumerates those rights afforded to residents of nursing homes in the state of Florida.
14. As Florida Statutes, Chapter 400.022 does not enumerate retention, hiring, and supervision of nurses as a statutory right afforded to residents at nursing homes in the State of Florida and as Florida Statute, Chapter 400.022 does enumerate numerous rights. afforded to residents at nursing homes in the state of Florida, resident's in nursing homes in the state of Florida do not have any statutory rights with regards to the retention, hiring, and supervision of nurses. See *PW Ventures, Inc. v. Nicholas*, 533 So.2d 281 (Fla. 1988) (holding that the express mention of one thing implies the exclusion of another); *Mingo v. ARA Health Services, INC.*, 638 So.2d 85 (Fla 2d DCA 1994) (holding When a statute enumerates things upon which it is to operate, it should be construed as excluding form its operation things of the same class or category which it does not mention).
15. Rather, Negligent retention and hiring is a separate cause of action with its own elements. See *Doe v. Evans*, 718 So.2d 286 (Fla. 4<sup>th</sup> DCA 1998); *Watson v. City of Hialeah*, 552 So.2d 1146 (Fla. 3d DCA 1989); *Bennett v. Godfather's Pizza Inc.*, 570 So.2d 1351 (Fla. 3d DCA 1990).
16. Plaintiff has failed to state a cause of action for negligent hiring, negligent retention, and/or negligent supervision.
17. Moreover, as Florida Statutes, Chapter 400.023 specifically provides that it is the exclusive remedy for a violation of resident rights and precludes recovery for damages under theories of negligence.

Sections 400.023- 400.0238 provide the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a nursing home resident arising out of negligence or a violation of rights specified in s. 400.022. This section does not preclude theories of recovery not arising out of negligence or s. 400.022, which are available to a resident or to the agency.

18. As such, Counts I, II and III of the Complaint should be dismissed for improperly stating a cause of action for negligent training, hiring and retention.

***COUNT IV SHOULD BE DISMISSED FOR IMPROPERLY ALLEGING A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY IN VIOLATION OF THE EXCLUSIVE REMEDY PROVISION OF § 400.023, FLA. STAT.***

19. Count IV should be dismissed for improperly alleging a cause of action for Breach of Fiduciary Duty in violation of the exclusive remedy provision of [§ 400.023, Fla. Stat.](#)

20. To recover damages from the alleged Breach of Fiduciary Duty, the plaintiff must prove (1) the existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damages caused by the breach. [Gracey v. Eaker; 837 So.2d 348, 353 \(Fla. 2002\)](#). Plaintiff's claim must fail because Florida has not recognized a fiduciary relationship between a nursing home and its residents. There are no opinions in the jurisprudence of the State of Florida recognizing such a fiduciary relationship.

21. While Florida has recognized that fiduciary relationships exist in the context of the physician-patient relationship, therapist-patient relationship and counselor-patient relationships, no such fiduciary relationship has been extended to the nursing home-resident relationship. *See Gracey* at 352. The Supreme Court of Florida in *Gracey* relied on the [Restatement \(Second\) of Torts, § 874](#), comment a., to address the boundaries of a fiduciary relationship: A fiduciary relation exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of that relation.

22. While the nursing home is undoubtedly under a duty to provide care and treatment to its residents, the relationships between the nursing staff and the residents is not such that they are required to give advice to the residents. It is undisputed that such advice is limited to the relationship between the residents and their physicians. To hold otherwise would expand the confines of the traditional fiduciary relationship well beyond that envisioned by the Supreme Court of Florida.

23. While plaintiff failed to provide a the type and amount of damages sought as a result of the alleged breach, presumably, the damages sought are those that would naturally stem from negligence. *See Complaint generally*. No such damages have been recognized in Florida Jurisprudence as damages from an alleged breach of the fiduciary duty relationship. Furthermore, for the Court to find otherwise would mean, for example, that medical malpractice claims would be allowed to be doubly plead as both a medical malpractice claim and as a breach of the physician-patient fiduciary relationship claim. The context most commonly found to be a breach of the fiduciary relationship in physician-patient or psychiatrist-patient relationship is the disclosure of confidential information. *Id* at 352. No such allegation of disclosure of confidential information is present in plaintiff's Complaint.

24. In addition, plaintiff seeks damages against defendants for violations of resident's rights, which arise out of negligence. Thus, Count IV is barred by the exclusivity provision of [Fla. Stat. 400.023](#), which provides that [Section 400.023](#) is the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a resident arising out of negligence or a violation of resident rights. The Complaint arises out of the alleged rendering or failure to render care or services. All of the allegations need to be proven through evidence that the nursing home fell below the standard of care applicable to nursing homes. Because this is an action for violation of James Zeigler. resident rights under Chapter 400, the Breach of Fiduciary Duty claim cannot stand as it violates the exclusive remedy provision. The alleged breach of fiduciary duty is not and can never be an alternative cause of action for nursing home negligence resulting in personal injury. *See, e.g. Bohannon v. Shands Teaching*

*Hospital and Clinics, Inc.*, 983 So. 2d 717, 721 (Fla. 1st DCA 2008) (holding that Chapter 415 was not intended by the Florida Legislature to provide an alternative cause of action for medical negligence).

***COUNT V AND VI OF THE COMPLAINT SHOULD BE DISMISSED FOR IMPROPERLY  
STATING A CLAIM PURSUANT TO FLORIDA STATUTES, CHAPTER 415.1111***

25. Count V and VI of the Complaint seeks damages or violation of Florida Statutes, Chapter 415.1111.

26. [Section 415.1111, Florida Statutes](#), the Adult Protective Services Act, does not apply to the named companies or named individuals, but is specifically designed to address **elder abuse** by caregivers of vulnerable adults.

27. [Section 415.1111](#) creates a private cause of action by victims against perpetrators of **abuse**, neglect, or exploitation.

28. [Section 415.1111](#) does not apply to these defendants because they are not “perpetrators as defined by Chapter 415. Section 415.102(2) defines an alleged perpetrator as:

A person who has been named by a reporter as the person responsible for **abusing**, neglecting, or exploiting a vulnerable adult

29. These defendants cannot be perpetrators of **abuse**, neglect, or exploitation under Chapter 415 because they were not caregivers for Zeigler. Specifically with regard to the corporate entities, caregivers as defined by [Fla. Stat. 415.102\(4\)](#) are natural persons.<sup>1</sup>[1][1] The corporate entities cannot be caregivers under the statute because they are not natural persons.

30. In addition, plaintiff has failed to state how any of these defendants, **abused**, neglected or exploited Zeigler within the statutory definitions of those terms.<sup>2</sup>[2][2] Plaintiff cannot simply track the language in the statute without ultimate facts that would support the cause of action. See *Gilbert v. Merritt*, 901 So.2d 334, (Fla. 4th DCA 1983) (quoting *Brown v. Gardens by the Sea South Condominiums Ass'n*, 424 So.2d 181, 183 (Fla. 4th DCA 1983)). In Counts V and VI, plaintiff simply copied the statutory language of [Florida Statute 415.1111](#), and used it as ultimate facts. Thus, Count V and VI should be dismissed and plaintiff should be required to plead actual ultimate facts to support the cause of action.

31. Further, Count V and VI appears to seek damages in this case for alleged Medicare and Medicaid fraud. Plaintiff has no standing to recover such damages. There is no private cause of action available for a nursing home resident for alleged Medicare or Medicaid fraud. See *Stewart v. Bernstein*, 769 F. 2d 1088, 1092 (5th Cir. 1985); see also *Chalfin v. Beverly Enterprises, Inc.*, 741 F. Supp. 1162, 1168 (E.D. Penn. 1989); *Ratmancky v. Plymouth House Nursing Home, Inc.*, 2005 WL 770628 (citations omitted).

32. In addition, Counts V and VI are barred by the exclusivity provision of [Fla. Stat. 400.023](#), which provides that [Section 400.023](#) is the exclusive remedy for a cause of action for recovery of damages for the personal injury or death of a resident arising out of negligence or a violation of resident rights. Counts V and VI are also barred by the exclusivity provision of [Fla. Stat. 415.1111](#), which states, in relevant part, that any civil action for damages against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part II of chapter 400 relating to its operation of the licensed facility shall be brought pursuant to s. 400.423. Such licensee or entity shall not be vicariously liable for the acts or omissions of its employees or agents or any other third party in an action brought under this section.

WHEREFORE, based on the foregoing, defendants respectfully request that the Court enter an order dismissing the Complaint.

<<signature>>

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